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 RICHARD W. WICKING
 CLERK OF COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND

8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA
 10 (OAKLAND DIVISION)

ADR

006-02337

JSW

12 JENNIFER CHANG, by and through her
 13 parents, NORMAN AND LINA CHANG

14 Plaintiffs,

15 vs.

16 CALIFORNIA SCHOOL FOR THE DEAF,
 17 CALIFORNIA DEPARTMENT OF
 18 EDUCATION, and FREMONT UNIFIED
 19 SCHOOL DISTRICT,

20 Defendants.

Case No.

COMPLAINT FOR DAMAGES,
DECLARATORY RELIEF, AND
INJUNCTIVE RELIEF PURSUANT
TO:

1) INDIVIDUALS WITH
DISABILITIES EDUCATION ACT, 20
U.S.C. §§ 1400 et seq.;

2) REHABILITATION ACT, 29 U.S.C.
§§ 794 et seq.;

3) AMERICANS WITH DISABILITIES
ACT, 42 U.S.C. §§ 12101 et seq.

21 I. INTRODUCTORY STATEMENT

22 1. Plaintiff Jennifer Chang ("Jennifer"), a thirteen-year-old deaf child
 23 with autism, and her parents, Norman and Lina Chang, appeal an administrative hearing
 24 decision denying Jennifer an appropriate education in her primary language, American Sign
 25 Language. The plaintiffs bring this action against defendants California School for the
 26 Deaf - Fremont ("CSDF"), California Department of Education ("CDE"), and the Fremont
 27 Unified School District ("FUSD"), and each of them, under the Individuals with Disabilities
 28

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COMPLAINT FOR DAMAGES, DECLARATORY
 RELIEF, AND INJUNCTIVE RELIEF
 Case No. _____

JSW CHAMBERS COPY

Case No. C 06-02337 JSW

1 Education Act ("IDEA"), 20 U.S.C. §§ 1400, *et seq.*, the Americans with Disabilities Act
2 ("ADA"), 42 U.S.C. §§ 12101, *et seq.*, and Section 504 of the Rehabilitation Act
3 ("Rehabilitation Act"), 29 U.S.C. §§ 794, *et seq.*

4 2. Plaintiffs allege that defendants are violating Jennifer's right to a free
5 appropriate public education under the IDEA, by, among other things, refusing to allow
6 Jennifer to be educated with her deaf peers in her only language, American Sign Language.
7 Plaintiffs further allege that defendants are unlawfully discriminating against Jennifer on
8 the basis of her disability by making educational placement decisions based on her category
9 of disability, in violation of the ADA and the Rehabilitation Act.

10 3. On September 4, 2005, CSDF requested a due process hearing to
11 remove Jennifer from their deaf program and to place her in a hearing program for autistic
12 children. The Administrative Law Judge ("ALJ") in the Office for Administrative Hearings
13 ("OAH") denied plaintiffs' motion to continue the due process hearing so that they could
14 consolidate their counter-petition against the CSDF. On January 5, 2006, the ALJ issued a
15 decision in favor of defendants CSDF and the FUSD and against plaintiffs.

16 4. Jennifer, being aggrieved by the due process hearing decision, brings
17 this civil action pursuant to 20 U.S.C. § 1415(i)(2)(A). Pursuant to 20 U.S.C. § 1415(j),
18 Jennifer seeks injunctive relief requiring defendants to maintain her current educational
19 placement, which includes instruction at CSDF in the mornings, and attendance at a Special
20 Day Class at Maloney Elementary in the afternoon.

21 **II. JURISDICTION, VENUE AND INTRADISTRICT ASSIGNMENT**

22 5. This Court has jurisdiction over the federal claims in this action
23 pursuant to 20 U.S.C. § 1415(i)(2)-(3) and 28 U.S.C. § 1331.

24 6. Venue is proper in this Court under 28 U.S.C. § 1391(b). All
25 defendants reside, maintain offices, or enforce the laws relevant to this litigation in the
26 Northern District of California. All the events which are the subject of this complaint
27 occurred within the Northern District of California.
28

1 7. Assignment to the San Francisco or Oakland division of this court is
2 appropriate. All parties reside or conduct business in Alameda County. All events which
3 are the subject of this litigation took place in Alameda County. Civil L.R. 3-5(c), Civil
4 L.R. 3-2(d).

5 **III. EXHAUSTION OF ADMINISTRATIVE REMEDIES**

6 8. Plaintiffs have exhausted their administrative remedy pursuant to 20
7 U.S.C. § 1439 and 34 C.F.R. § 303.420-303.425.

8 **IV. PARTIES**

9 **PLAINTIFFS**

10 9. Jennifer is a thirteen-year-old minor with multiple disabilities. She is
11 a resident of Fremont, California, and a pupil in the jurisdiction of the FUSD. Jennifer has
12 been diagnosed as deaf, autistic, and cognitively impaired, and therefore is a "child with a
13 disability" within the meaning of the IDEA, 20 U.S.C. § 1401(3), and is a qualified
14 individual with a disability within the meaning of the ADA and the Rehabilitation Act. 42
15 U.S.C. § 12131(2); 29 U.S.C. § 794.

16 10. Norma and Lina Chang are Jennifer's parents and reside in Fremont,
17 California with Jennifer. They have legal and physical custody of Jennifer. Both parents
18 know American Sign Language and use it every day to communicate with Jennifer.

19 **DEFENDANTS**

20 11. CSDF is a subdivision of the California Department of Education
21 pursuant to California Education Code Sections 59000-59054. CSDF is a recipient of
22 federal funds under the IDEA, is a "local education agency" within the meaning of the
23 IDEA, 20 U.S.C. § 1401(4), and must therefore comply with the Act and its regulations.
24 CSDF is a public entity within the meaning of the ADA, 42 U.S.C. § 12131(1). CSDF is
25 also a "program or activity" that receives federal funding within the meaning of the
26 Rehabilitation Act, 29 U.S.C. § 794(b).

27 12. CDE is the state educational agency responsible for monitoring the
28 implementation of the IDEA in the State of California. CDE receives federal funds under

1 the IDEA and other federal financial assistance programs and therefore is subject to the
2 requirements of 20 U.S.C. §§ 1400, *et seq.* CDE has also assumed direct educational
3 responsibility for the deaf students in California pursuant to California Education Code §§
4 59000-59054. CDE is a public entity within the meaning of the ADA, 42 U.S.C. §
5 12131(1) and a "program or activity" that receives federal funding within the meaning of
6 the Rehabilitation Act, 29 U.S.C. § 794(b).

7 13. FUSD is a political subdivision of the State of California and a duly
8 incorporated school district located in Fremont, California. FUSD is a recipient of federal
9 funds under the IDEA, is a "local education agency" within the meaning of the IDEA, 20
10 U.S.C. § 1401(4), and must therefore comply with the Act and its regulations. FUSD is a
11 public entity within the meaning of the ADA, 42 U.S.C. § 12131(1) and a "program or
12 activity" that receives federal funding within the meaning of the Rehabilitation Act, 29
13 U.S.C. § 794(b).

14 **V. FACTUAL BACKGROUND**

15 14. Jennifer was born deaf, autistic and developmentally disabled.
16 Jennifer has received intervention services since infancy. She began attending CSDF at the
17 age of 20 months. In June 1995, when Jennifer was three years old, FUSD began providing
18 occupational therapy services to address sensory issues which affected her overall
19 performance.

20 15. In Fall 1999, Jennifer began to attend a special day class at CSDF.
21 FUSD conducted another evaluation of Jennifer's performance and behavior in October
22 1999 and concluded that Jennifer was a student with profound hearing loss and significant
23 developmental delays. Jennifer, however, responded to simple sign language, pictures and
24 other means of visual communication. This evaluation found that Jennifer remained
25 eligible for special education services due to her developmental disability and bilateral
26 deafness.

27 16. Jennifer continued full time attendance at CSDF through the 2003-
28 2004 school year. At an Individualized Education Program ("IEP") (see paragraph 23

1 below for more information regarding IEPs) team meeting on October 18, 2002, CSDF
2 began its attempts to discharge Jennifer from CSDF by recommending that she be referred
3 back to FUSD for placement in a severely handicapped class designed for hearing students
4 who are autistic, developmentally disabled, or with other severe disabilities. Plaintiffs
5 objected to this change in placement and stated that they saw steady growth in Jennifer's
6 sign language skills and development during her attendance at CSDF, and believed that her
7 only means of communication was American Sign Language. Jennifer remained in the
8 Special Needs Elementary program at CSDF at that time.

9 17. CSDF has consistently refused to develop appropriate programs for
10 deaf students with multiple disabilities. CSDF has formally taken the position that it is not
11 obligated to deaf children who have additional disabilities, i.e., that it only serves deaf
12 children who do not otherwise have multiple disabilities.

13 18. At an IEP meeting on May 28, 2004, CSDF and FUSD stated that
14 Jennifer was not making progress and proposed a transition out of the program at CSD and
15 into a Special Day Class for moderate to severe autistic students at Maloney Elementary
16 School in FUSD. Plaintiffs initiated due process regarding this proposed placement.
17 Plaintiffs, FUSD and CSDF reached an agreement in which Jennifer would attend a school
18 district program for autistic hearing children in the afternoon with a signing aide in the
19 2004-05 school year.

20 19. At an IEP meeting in April of 2005, CSDF and FUSD again
21 proposed transferring Jennifer full time to FUSD's Special Day Class for the 2005-2006
22 school year. Plaintiffs refused to consent to a change in placement that would deny Jennifer
23 the right to an education with a teacher and peers who utilize Jennifer's primary language.

24 20. CSDF requested a due process hearing under the IDEA seeking to
25 enforce the change in placement. Plaintiffs initiated a Counter Petition against both CSDF
26 and FUSD alleging that CSDF and CDE were failing to provide Jennifer an education in
27 her only and primary language, sign language, and further, were purposefully failing to
28

1 appropriately educate Jennifer to prevent her from progressing at CSDF, thereby justifying
2 their attempts to discharge her from CSDF.

3 21. Plaintiffs sought a continuance of the hearing addressing CSDF's
4 petition in order to allow consolidation of their counter-petition with that of CSDF. The
5 ALJ issued two orders which denied plaintiffs' right to due process, including (a) an order
6 finding that the plaintiffs' petition was insufficient to form the basis for a valid due process
7 proceeding under the IDEA and (b) an order denying a continuance to allow plaintiffs'
8 counter-petition to be heard with CSDF's Petition. The ALJ, therefore, did not address the
9 plaintiffs' issues raised in their counter-petition.

10 22. The ALJ conducted an administrative hearing pursuant to federal and
11 state law on November 14, 15, 28, 29, and 30, and December 5, 2005, pursuant to 20
12 U.S.C. §1415(f). The ALJ issued a decision on January 5, 2006, concluding that while
13 Jennifer's primary language was sign language, FUSD's autism program for hearing
14 children was appropriate for Jennifer. The ALJ rejected plaintiffs' contention that for an
15 education to be appropriate under the IDEA and California law, it must be taught in the
16 student's primary, and here her primary, language.

17 **VI. STATUTORY FRAMEWORK**

18 **Individuals with Disabilities Education Act**

19 23. The IDEA and the Individuals with Disabilities Education
20 Improvement Act, 20 U.S.C. §§1400, *et seq.*, as amended, and the regulations promulgated
21 thereunder, 34 C.F.R. Part 300, detail specific rights to which a child with a disability is
22 entitled. These rights include, but are not limited to:

23 a. the right to have planned and implemented an appropriate
24 Individualized Education Programs (hereinafter "IEPs") pursuant to 34 C.F.R. §§300.309,
25 300.340, 300.342, 300.343, 300.344, 300.345, 300.346, 300.347 and 300.350; and

26 b. the right to a "free and appropriate public education"
27 ("FAPE") 20 U.S.C. §1401(9); 34 C.F.R. §300.13.
28

1 24. States are required by 20 U.S.C. §1412(4) and 20 U.S.C. §1414(d) to
2 ensure that each local educational agency in the state seeks and identifies all areas of need
3 for those individuals with disabilities and establishes and maintains an appropriate IEP for
4 each disabled student. The local public education agencies are held responsible by C.F.R.
5 §300.343 for initiating and conducting meetings for the purpose of appropriately
6 developing, reviewing, and revising a disabled child's IEP

7 25. Federal law, in the case of the child who is deaf or hard-of-hearing,
8 requires public educational agencies to consider the child's language and communications
9 needs, opportunities for direct communications with peers and professional personnel in the
10 child's language and communication mode, including opportunities for direct instruction in
11 the child's language and communication mode pursuant to 34 C.F.R. §300.346(a)(2)(iv).

12 26. California has enacted a deaf "Bill of Rights," which requires that
13 that hard-of-hearing and deaf children have an education in which special education
14 teachers and other special education personnel are proficient in the primary language mode
15 of those deaf children, and with a sufficient number of language mode peers with whom
16 they can communicate directly and who are the same, or approximately the same, age and
17 ability level. Cal. Ed. Code §56000.5(b).

18 27. Pursuant to 20 U.S.C. §1415(f), a due process hearing must be held
19 regarding any dispute arising in relation to a student's IEP, or the failure of a district to
20 provide a free appropriate public education (FAPE) in the least restrictive environment
21 (LRE). Any party aggrieved or partially aggrieved by the findings and decision rendered
22 after a state level hearing has the right to bring a civil action in the United States District
23 Court. 20 U.S.C. § 1415(i)(2); 34 C.F.R. §300.512. In such an action, the Court shall
24 receive the records of the administrative proceedings, shall hear additional evidence at the
25 request of a party and shall grant such relief as the Court determines is appropriate pursuant
26 to 20 U.S.C. §1415(i)(2)(B)(i) – (iii).

VII. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

[IDEA, § 1412(a)(5); §1414(d); 34 C.F.R. § 300.552(e)]

28. Plaintiffs hereby incorporate by reference paragraphs 1-27 above.

29. Defendants, by their actions and inactions set forth above, violate the following rights under the IDEA:

a. the right to have an IEP that provides an educational program in a language that will allow Jennifer to communicate with her teacher and peers pursuant to 34 C.F.R. §300.346(a)(2)(iv); and

b. the right to have access to a due process proceeding to dispute the appropriateness of the education offered by defendants, rather than rejecting plaintiffs' valid claims as insufficient, and then forcing plaintiffs to defend an administrative hearing without the ability to raise plaintiffs' issues pursuant to 20 U.S.C. §1415 (f).

30. Defendants have violated plaintiffs' substantial due process rights under the IDEA, 20 U.S.C. §§1400, *et seq.*, by failing to offer Jennifer an education that is provided in her primary and only language, therefore violating the IDEA, and failing to implement California law including but not limited to the following rights:

a. the right to have planned and implemented appropriate IEP pursuant to 34 C.F.R. §§300.309, 300.340, 300.342, 300.343, 300.344, 300.345, 300.346, 300.347 and 300.350;

b. the right to be provided with full and appropriate educational opportunities pursuant to 20 U.S.C. § 1414 (d), 20 U.S.C. § 1412 (a) (2), and 34 C.F.R. § 300.304;

c. the right to an education in a communication mode that will allow Jennifer to communicate with her teacher and peers pursuant 34 C.F.R. §300.346(a)(2)(iv); and

d. the right as a deaf individual in California to an education in which a special education teacher and other special education personnel who are proficient

1 in the primary language mode of those deaf children, and with a sufficient number of
 2 language mode peers with whom they can communicate directly and who are the same, or
 3 approximately the same, age and ability level pursuant to Cal. Ed. Code §56000.5(b).

4 **SECOND CLAIM FOR RELIEF**

5 [ADA, 42 U.S.C. §§12101, *et seq.*; 28 C.F.R. § 35.130(b)(1)(I)]

6 31. Plaintiffs hereby incorporate by reference paragraphs 1-27 above.

7 32. Defendants, by its actions and inactions set forth above, violate the
 8 ADA, 42 U.S.C. §§ 12131, *et seq.*, and its implementing regulations, 28 C.F.R. Part 35, by
 9 denying, on the basis of the severity and type of disability, the opportunity to benefit from
 10 defendants' services and programs, as prohibited by 28 C.F.R. § 35.130(b)(1)(I).

11 **THIRD CLAIM FOR RELIEF**

12 [Section 504 of the Rehabilitation Act, 29 U.S.C. §§ 794, *et seq.*; 34 C.F.R. Part
 13 104]

14 33. Plaintiffs hereby incorporates by reference paragraphs 1-27 above.

15 34. Defendants, by its actions and inactions set forth above, violate
 16 Section 504 of the Rehabilitation Act, 29 U.S.C. §§ 794, *et seq.*, and its implementing
 17 regulations, 34 C.F.R. Part 104, by denying, on the basis of the severity and type of
 18 disability, the opportunity to benefit from defendants' services and programs.

19 **FOURTH CLAIM**

20 [IDEA 20 U.S.C. § 1415(j)]

21 35. Plaintiffs hereby incorporate by reference paragraphs 1 -34 above.

22 36. Plaintiffs requests that this Court enter a preliminary injunction
 23 ordering that Jennifer remain in the last agreed-upon educational placement for the
 24 pendency of the litigation (a "stay put" order), pursuant to 20 U.S.C. § 1415(j).

25 **VIII. ATTORNEYS' FEES**

26 37. Plaintiffs are entitled to and seeks an award of their attorneys' fees
 27 and costs pursuant to the IDEA, 20 U.S.C. § 1415(i)(3)(B), the ADA, 42 U.S.C. § 12205,
 28 and the Rehabilitation Act, 29 U.S.C. § 794a(b).

IX. PRAYER FOR RELIEF

38. Plaintiffs respectfully request that this Court enter judgment on their behalf and enter preliminary and permanent injunctive relief and declaratory relief as follows:

(a) Entering a preliminary injunction (a "stay-put" order) so that Jennifer remain in the last agreed-upon education placement for the pendency of the litigation, pursuant to 20 U.S.C. § 1415(j);

(b) Receiving the administrative record in this matter and hear and receive additional evidence offered by plaintiffs on the issues raised on appeal in this matter;

(c) Declaring that defendants violated Jennifer's rights under the IDEA by failing to educate Jennifer with her deaf peers to the maximum extent appropriate; failing to provide her with the supplementary aids and services necessary to allow her to be educated in her primary language, sign language, to the maximum extent appropriate; and failing to provide her the opportunity to be involved in and progress in the CSDF's curriculum for the deaf;

(d) Issuing a declaratory judgment that defendants' placement offer for Jennifer, a deaf individual, in a full time autism program for hearing students for the 2005-06 school year violates Jennifer's right to a free appropriate public education;

(e) Declaring that defendants violated the ADA by denying Jennifer, on the basis of the severity and type of disability, the opportunity to benefit from defendants' services and programs;

(f) Declaring that defendants violated Jennifer's rights under Section 504 of the Rehabilitation Act by denying her, on the basis of the severity and type of disability, the opportunity to benefit from defendants' services and programs;

(g) Ordering defendants to provide a deaf program for deaf children with multiple disabilities;

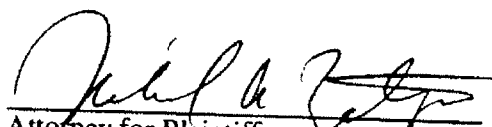
1 (h) Awarding plaintiffs appropriate damages, and reasonable
2 attorney's fees and costs' in accordance with the IDEA, 20 U.S.C. §§ 1415 (i)(3)(B); and,

3 (i) Ordering such other relief as the Court may deem just,
4 equitable, and proper.

5 **X. DEMAND FOR JURY TRIAL**

6 36. Plaintiffs demand a jury trial for all claims as provided for in Rule 38 of the
7 Federal Rules of Civil Procedure.

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9 Dated: April 3, 2006

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12 Attorney for Plaintiffs
13 Jennifer Chang, by and through her
14 parents, Norman and Luna Chang
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